



# IDAHO

DEPARTMENT OF FINANCE

DIRK KEMPTHORNE  
Governor

GAVIN M. GEE  
Director

January 26, 2005

[REDACTED]

Re: Request for Interpretation

Dear Mr. [REDACTED]:

This is in reference to your request for an interpretation as to whether an offering proposed by a group organizing as a state chartered bank in Idaho, would qualify for exemption from registration in Idaho pursuant to Section 30-14-201(3) (b) of the Idaho Uniform Securities Act (the Act).

As we have discussed, the exemption under Section 30-14-201(3) (b) of the Act, and the corresponding exemption under the Idaho Securities Act (the Predecessor Act), have historically been interpreted by our Department as applicable only to those securities offered by state or federally chartered banks.

**Exemption from Registration—Section 30-14-201(3)(b)**

Specifically, the Act states that a security is exempt from the registration requirements of Section 30-14-301 if the security is:

“A security issued by and representing, or that will represent, an interest in or a direct obligation of, or be guaranteed by:

(b) A banking institution organized under the laws of the United States; a member bank of the federal reserve system; or a depository institution a substantial portion of the business of which consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the federal deposit insurance corporation...”

Your letter questions the language “or that will represent” and “or will consist of receiving deposits” as implying that the exemption applies to banks in formation as well as those that are already chartered. We do not concur with this interpretation. It is our view that the above language refers to a security: 1) that is being issued by a bank or depository institution; and 2) which does, or will in the future “represent an interest in or direct obligation of, or be

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guaranteed by” a bank or depository institution. Our view is that this exemption is intended to exempt only those securities of institutions that are already organized as a bank or depository institution, as is defined under Section 30-14-102(3) of the Act.

**State Preemption--15 USC §77r(a)**

As you have noted, federal preemption of state securities laws relating to “covered securities” is provided in 15 USC §77r(a). As it pertains to banks, this section reads:

(a) Scope of exemption

Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof—

- (1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that—

(A) is a covered security; or

(B) will be a covered security upon completion of the transaction;

Your letter indicates your view that the language in subsection (B), which reads “will be a covered security upon completion of the transaction” implies that securities issued by banks in organization are also “covered securities” and therefore, state law is preempted. We do not agree with this interpretation. It is our view that this language pertains to securities that will, solely as a result of the offering, be considered “covered securities” upon completion of the offering. This is not the case with regard to securities issued by a bank in formation. Capitalization is but one element in the process of becoming a state chartered bank. Simply raising the required capital does not result in the bank in formation becoming chartered. Therefore, it is our view that subsection (B) does not apply to this situation.

**No Enforcement Action**

In light of the above, we do not view the exemption from registration provided under Section 30-14-201(3)(b) of the Act as available to your client.

However, based on the representations reflected in your letter and in discussions with you, we understand that the offering will be structured to incorporate the following:

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- 1) An escrow account will be established into which investor funds will be held until your client has obtained the appropriate FDIC approval, and is granted a state charter from this Department. We understand that the escrow funds will be held in a state or federally chartered bank, in certificate of deposits or other Federal Deposit Insurance Corporation (FDIC) insured accounts, and that if your client is not granted a charter by this Department, all funds will be returned to investors along with any interest accrued on the account. Furthermore, your client agrees to structure the escrow agreement in such a manner that the Director of this Department must give approval to release the escrowed funds.
- 2) Your client will comply with all provisions of the Idaho Bank Act, and rules and requirements of the FDIC.
- 3) The offering will be sold only by your client's officers, directors, and employees, and those individuals will not be compensated either directly or indirectly for the sale of the securities.
- 4) A copy of the prospectus will be submitted to our Department for review and comment prior to the commencement of the offering.

We view the above structure of your client's offering as providing necessary investor protections and assurances for an offering of this nature. Therefore, based on the representations contained in your letter, our Department will take a "no-action" position with regard to the registration of the securities in question. Should circumstances in this matter change, or should your representations be deemed inaccurate, our "no-action" position may also change.

If you have any questions regarding the above, please contact the undersigned.

Sincerely,



MARILYN T. CHASTAIN  
Securities Bureau Chief  
Idaho Department of Finance

CC: Greg Lovell  
Gavin Gee  
Mary Hughes